

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

JIMMIE DERELL COOPER,

Petitioner,

vs.

BRIAN E. WILLIAMS, SR., et al.,

Respondents.

Case No. 2:11-cv-01008-PMP-GWF

**ORDER**

Before the court are the petition for a writ of habeas corpus (#1) and respondents' motion to dismiss (#9). Petitioner has not filed any response to the motion to dismiss. The court agrees with respondents that petitioner has not exhausted his available state-court remedies for any of his grounds for relief. The court grants the motion and dismisses the action.

Pursuant to a plea agreement, in state court petitioner was convicted of felony driving under the influence of intoxicating liquor. Ex. 22 (#9-23). Petitioner appealed, and the Nevada Supreme Court affirmed. Ex. 35 (#9-36). Petitioner filed a petition for rehearing. Ex. 36 (#9-37). The Nevada Supreme Court denied rehearing. Ex. 38 (#9-39). Petitioner then filed a motion for a modification of his sentence. Ex. 40 (#9-41). The state district court denied the motion. Ex. 44 (#9-45). Petitioner appealed, and the Nevada Supreme Court affirmed. Ex. 46 (#9-47). Petitioner then commenced this action.

Before a federal court may consider a petition for a writ of habeas corpus, the petitioner must exhaust the remedies available in state court. 28 U.S.C. § 2254(b). To exhaust a ground for relief, a petitioner must fairly present that ground to the state's highest court, describing the

1 operative facts and legal theory, and give that court the opportunity to address and resolve the  
2 ground. See Duncan v. Henry, 513 U.S. 364, 365 (1995) (*per curiam*); Anderson v. Harless, 459  
3 U.S. 4, 6 (1982).

4 “[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available state  
5 remedies only if he characterized the claims he raised in state proceedings specifically as federal  
6 claims. In short, the petitioner must have either referenced specific provisions of the federal  
7 constitution or statutes or cited to federal case law.” Lyons v. Crawford, 232 F.3d 666, 670 (9th  
8 Cir. 2000) (emphasis in original), amended, 247 F.3d 904 (9th Cir. 2001). Citation to state case law  
9 that applies federal constitutional principles will also suffice. Peterson v. Lampert, 319 F.3d 1153,  
10 1158 (9th Cir. 2003) (*en banc*). “The mere similarity between a claim of state and federal error is  
11 insufficient to establish exhaustion. Moreover, general appeals to broad constitutional principles,  
12 such as due process, equal protection, and the right to a fair trial, are insufficient to establish  
13 exhaustion.” Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (citations omitted).

14 Petitioner was convicted of violating former Nev. Rev. Stat. § 484.3792(2), which imposed  
15 a greater punishment for felony driving under the influence because he previously had been  
16 convicted of one or more counts of felony driving under the influence pursuant to Nev. Rev. Stat. §  
17 484.379. In ground 1, petitioner claims that his conviction at issue in this case is invalid because  
18 one of the prior convictions had been vacated as void. Petitioner did not present this claim to the  
19 Nevada Supreme Court either on direct appeal or on the appeal from the denial of his motion to  
20 modify his sentence.<sup>1</sup> Ground 1 is not exhausted.

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24 <sup>1</sup>In his petition for rehearing on the direct appeal, petitioner noted that the Nevada Supreme  
25 Court had held that he had not challenged the validity of his prior judgments of conviction. He also  
26 noted that that statement was incorrect. Ex. 36, at 2 (#9-37). However, the sole issue on direct  
27 appeal was whether state law required the state district judge to have recused herself because she  
28 had been a prosecutor who was involved in one of petitioner’s earlier cases. Petitioner was arguing  
that the Nevada Supreme Court misstated a fact that it used to support its finding that the state  
district judge did not need to recuse herself. Petitioner did not present the legal claim that he  
presents to this court, that his judgment of conviction at issue in this case was invalid because the  
prior judgments were invalid.

1 Ground 2 is a claim state-court proceedings were commenced in the wrong justice court.  
2 Petitioner did not present this claim to the Nevada Supreme Court in either his direct appeal or in  
3 the appeal from the denial of his motion to modify his sentence. Ground 2 is unexhausted.<sup>2</sup>

4 Ground 3 is a claim that petitioner received ineffective assistance of counsel for two  
5 reasons. First, petitioner claims that Nadine Morton, his counsel, did not appear at sentencing, and  
6 that the attorney who appeared on her behalf did not argue for a sentence in accordance with the  
7 plea agreement. This led to petitioner receiving a sentence of 24 to 120 months in prison, instead of  
8 the agreed-upon sentence of 24 to 60 months. Second, petitioner claims that Morton did not file his  
9 motion for the state district judge to recuse herself because the judge had been a prosecutor who  
10 was involved in one of petitioner's prior cases. Petitioner did not present this claim to the Nevada  
11 Supreme Court in either his direct appeal or in the appeal from the denial of his motion to modify  
12 his sentence. Petitioner did complain in his motion to modify sentence that the sentence he received  
13 differed from what the plea agreement contemplated. However, in that motion petitioner claimed  
14 that the state district court and the prosecution breached the plea agreement. He did not claim that  
15 he received ineffective assistance of counsel. See Ex. 40 (#9-41). The operative facts and the legal  
16 theory are different. Ground 3 is not exhausted.

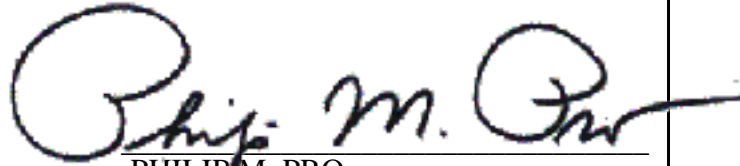
17 Ground 4 is a claim that the due process clause of the Fourteenth Amendment was violated  
18 because the state district judge did not recuse herself. She had been a prosecutor who was involved  
19 in an earlier prosecution of petitioner. Petitioner argued in direct appeal the state district judge  
20 should have recused herself, but he argued that solely as a matter of state law. See Ex. 31, at 3-4  
21 (#9-32). In its decision on direct appeal, the Nevada Supreme Court itself did not refer to federal  
22 law. See Ex. 35 (#9-36). Ground 4 is not exhausted because petitioner did not present the recusal  
23 issue to the Nevada Supreme Court as a matter of federal law.

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27 <sup>2</sup>Respondents argue in the alternative that ground 2 does not state a claim of violation of  
28 federal law. The court will not address this argument because it has found that ground 2 is not  
exhausted.

1 IT IS THEREFORE ORDERED that respondents' motion to dismiss (#9) is **GRANTED**.  
2 This action is **DISMISSED** without prejudice for petitioner's failure to exhaust his available state-  
3 court remedies. The clerk of the court shall enter judgment accordingly.

4 DATED: May 7, 2014

A handwritten signature in dark ink, appearing to read "Philip M. Pro", is written over a horizontal line.

PHILIP M. PRO  
United States District Judge